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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE PITTSBURGH STEAMSHIP COMPANY,
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 732

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

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Respondent.

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Questions Presented for Review

Two questions for review are stated in the body of the petition and two more in a footnote to the first question on the assumption that it is answered in the affirmative. We restate and renumber the questions in their proper sequence.

1. "Whether the scope of judicial review of findings of fact made by the National Labor Relations Board has been changed by the Administrative Procedure Act or the Labor Management Relations Act".

2. If that question is answered in the affirmative, "whether the Board's findings are supported by substantial evidence on the record considered as a whole".

3. If the answer to the first question is in the affirmative, "whether the scope of judicial review is so 'broadened' as to permit a court to substitute its own findings and inferences for the reasonable findings and inferences of the Board".

4. "Whether procedural changes made by the Administrative Procedure Act and the Labor Management Relations Act which govern the admissibility of evidence in proceedings before the Board and the standards to be adopted by the Board in making decisions apply to hearings concluded and decisions made by the Board prior to the effective date of these statutes".

We consider them in the above order.

I.

The First Question is Academic.

Section 10(e) of the Administrative Procedure Act commands the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * (5) unsupported by substantial evidence" and in making that determination to "review the whole record".

Section 10(c) of the Taft-Hartley Act requires the findings of the Board to be supported by "the preponderance of the testimony" and Section 10(e) of said Act provides that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive".

This cause was remanded to the Court of Appeals for a consideration of "the applicability and possible effect of either or both of these statutes" (337 U.S. 656, 661).

There is no contention that the statutory requirements above quoted are not applicable.

Since the statute now expressly requires the reviewing court to "review the whole record" in determining the sufficiency of the evidence, it is wholly immaterial whether the court already possessed that power or whether, as Judge

Learned Hand observed in *National Labor Relations Board* v. *Universal Camera Corporation*, (179 F. 2d 749, 752), "The most probable intent in adding the phrase, 'on the record considered as a whole', was to overrule what Congress apparently supposed—perhaps rightly—had been the understanding of some courts: i.e., that, if any passage could be found in the testimony to support a finding, the review was to stop, no matter how much other parts contradicted, or outweighed it".

The important consideration is that the statute now expressly commands reviewing courts to exercise the power "to review the whole record" in determining the sufficiency of the evidence. It cannot matter whether they already possessed that power.

In the case just cited and the cases in other circuits in which the view was expressed that the scope of review had not been changed by statute, the courts did "review the entire record" in determining whether there was substantial evidence to support the findings.

This Court reversed on the former review because it was "constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant" (337 U.S. 659). It remanded the cause for the Court of Appeals to consider the applicability and effect of the statutes. As Judge Allen observed, it could not have intended the Court of Appeals to pass upon the effect of the statute "*in vacuo*".

There is nothing in the opinion of this Court to indicate that it had reviewed the whole record.

II.

Whether the findings are "supported by substantial evidence on the record considered as a whole" is the real question in the case.

Judge Allen's thorough and accurate analysis of the record and her cogent and lucid statement of the grounds

of the decision should relieve this Court of the burden of reviewing the whole record.

III.

The Court of Appeals did not "substitute its own findings and inferences for the reasonable findings and inferences of the Board".

It found "on the record considered as a whole" that the Board's findings were not supported by substantial evidence (R. 877, 878, 880, 882, 884).

IV.

The fourth question, number two in the petition, is not presented by the record.

A. *The Ferbert Letters.*

The petitioner conceded in the Court of Appeals that Section 8(c) of the Taft-Hartley Act "immunized" those letters on the ground "that the reviewing court cannot restrain action which, under the 1947 Act, is no longer illegal" (R. 875).

The Court of Appeals did not hold that the letters could not be considered at all "because they contained no direct threat or promise of benefit", as assumed by the petitioner (p. 8).

On the contrary, it reviewed the whole record relating to the subject; the statements relating to wages and rotary hiring found by the Examiner to be untrue; the testimony of Union Vice-President Lawrenson that the statement relating to rotary hiring was a "downright misstatement", which the Examiner found to be uncontradicted; Lawrenson's own contradiction of it; the statute proving the truth of the statements respecting wages; the Union contract proving the truth of the statements respecting rotary hiring; the uncontradicted testimony of three witnesses that at the Cleveland meeting "in March, 1944, just before the opening of navigation, the petitioner unequivocally in-

structed its officers that they must maintain strict impartiality and not interfere with Union activity as long as such activity did not conflict with discipline or proper operation"; the letter to the Captains instructing them that there must be "no partiality"; and the Examiner's error of law in ruling that those instructions did not absolve the respondent of liability because they "were never communicated to the employees". As the result of that review of the whole record, the Court of Appeals found that the findings that the letters were "an integral part of a general course of coercive conduct" are "supported by no evidence" (R. 877-880).

B. *Incompetent Evidence "under the revised standards of the Taft-Hartley and Administrative Procedure Acts".*

The Court of Appeals did not deny enforcement of the Board's order because it admitted hearsay evidence.

In discussing the discharge of Shartle, Judge Allen referred to the fact that Shartle was allowed to testify that "the men on the ship, the electricians, the firemen, the oilers, the coal passers, the steward, the second cook, the porter, the deck hands, the deck watch, and the watchman" assured him that he was competent and that he had been discharged for Union activity, and in a footnote pointed out that "hearsay testimony was repeatedly admitted by the Examiner over objection and made the basis of important findings" (R. 882).

However, the case was not decided on that ground. The evidence relating to the discharge of Shartle was reviewed, with the conclusion that "reading the case in the light of the whole record, we conclude that Shartle was discharged for cause and that the finding that he was discharged for Union activity is not supported by reliable, substantial and probative evidence" (R. 882). In fact, there is nothing in the record even to create a suspicion that Shartle was discharged because he was a Union organizer, but if there were such a suspicion it would disappear "on a review of the whole record".

Thus the question posed by the petitioner, whether procedures already taken are affected by changes in the law, is not involved in respect of either the Ferbert letters or the admission of incompetent evidence.

In conclusion, the statement in Paragraph 4 of the petition (p. 10) that the Court of Appeals substituted "for the reasonable findings of the Board its own judgment concerning the credibility of witnesses, the weight of the evidence, and the inferences to be drawn therefrom" is a gross misrepresentation of an unanimous opinion rarely surpassed for cogency, accuracy and thoroughness.

The case was not decided on either the credibility of witnesses or the weight of evidence. The Court's final conclusion was thus expressed:

> "We think that to ignore the complete absence of union trouble on 66 ships where the positive instructions were that the rights of the men should be protected and where the basis of the holding against the employer is that it engaged in a general course of anti-union conduct, is to ignore the mandate of the two statutes that decision shall be based upon 'the record considered as a whole' ". (R. 884.)

We respectfully submit that the petition should be denied.

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